No. 87 - 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

HOWARD A. SASSE pro se
Petitioner

-vs-

BRUCE T. CUNNINGHAM, JR., et al
Respondents

PETITION
FOR A WRIT OF CERTIORARI
TO THE NORTH CAROLINA SUPREME COURT

HOWARD A. SASSE
WOOD WAND CORPORATION
2101 Sandhills Blvd.
Southern Pines,
North Carolina, 28387
(919)692-2205

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

The questions this court must resolve are:

Is the legal system (lawyers, members of the bar, judges, etc.) law unto itself? Or, is the legal system of this country also required to stand and comply with the same due process and equal protection or subjection to the law as all other citizens must do?

Does the Constitution give the judicial or any members of the bar the unquestioned authority to pass judgment on itself, or are they also accountable to the same due process of law - trial by jury

Has any member of the legal system an inherent power to usurp the laws of the land with influence and discrimination in protecting and benefitting fellow laymen?

PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit included:

Howard A. Sasse, pro se

Appellee

v

Bruce T. Cunningham, Jr.,

Appellant

and

Pollock, Fullenwider, Cunningham & Patterson, P.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HOWARD A. SASSE pro se
Petitioner

-vs-

BRUCE T. CUNNINGHAM, JR.,et al,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

The Petitioner, Howard A. Sasse, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the North Carolina Supreme Court entered in this proceeding appeal and denied on April 7, 1987.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina was as reported No. 730P86. North Carolina Court of Appeals No. 8620SC530, Moore County Superior Court No. 84 CVS779. The opinion of the North Carolina Court of Appeals reprinted as Appendix #18 was given as discretionary review pursuant to GS7A-31. Appeal denied.

JURISDICTION

The judgment of North Carolina Court of Appeals (Appendix #18) was entered on June 26, 1986 - appeal denied.

Rehearing in North Carolina Supreme Court entered December 18, 1986. Appeal denied April 7, 1987.

CONSTITUTIONAL PROVISIONS

STATUTES AND ORDINANCES

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Article 3

Amendments 7, 9 and 14.

STATEMENT OF THE CASE

I offer the following evidence:

STAGE OF PROCEEDINGS

FIRST INSTANCE:

The evidence to substantiate claim that petitioner was damaged by defendant, (Mr. Cunningham).

SECOND INSTANCE:

First complaint filed against defendant.

THIRD INSTANCE:

Motion for dismissal denied.

FOURTH INSTANCE:

Obstruction of obtaining legal assistance by defendant.

FIFTH INSTANCE:

Case goes to trial. Dismissed by trial judge.

SIXTH INSTANCE:

Petitioner files for review in Court of Appeals. Appeal rejected.

SEVENTH INSTANCE:

Petitioner filed appeal with North Carolina Supreme Court. Appeal rejected.

STAGE OF PROCEEDINGS

FIRST INSTANCE:

Mr. Bruce Cunningham, member of the law firm of Pollock, Fullenwider, Cunningham & Patterson PA was engaged by petitioner to bring action against a contractor, (Mr. McCrimmon) for damages in the erection of the petitioner's building.

The petitioner had a contract[1] with the contractor, Mr. McCrimmon, for $18,500.00 for proper erection of the building. $10,000.00 was paid to contractor when foundation slab was installed.

Contractor did not, nor would not, satisfactorily finish building. Contractor was informed by the Defendant, (Mr. Cunningham) that no further payment would be made on contract and claim would be filed for other damages.[2] Claim for $50,000.00[3] damages was filed by Mr. Cunningham.

In trial, two issues were put to the jury. (1) Was the contract between Howard A. Sasse and McCrimmon (contractor) breached? (2) If yes to issue #1, decision would be made on the amount of damages.[4]

(See appendix 1,2,3 &4.)

In trial, Mr. Cunningham claims contract breached and damage to be $23,481.00.[5] No mention made in trial of $50,000.00 damages agreed upon and filed in claim. No counter-claim presented and no mention made in trial of $8,500.00 pretrial setoff.

Jury's verdict: Contract breached and $17,000.00 awarded for damage.

Immediately after jury's decision, defendant, Mr. Cunningham, informs petitioner that he would have to pay contractor $8,500.00 on contract under rules of law. His explanation at that time was according to the rules of law the contract was still in effect. No mention was made of any pre-trial agreement. Petitioner informs defendant (Mr. Cunningham) he is fired and to return files.

(See appendix No.5)

Seven weeks after trial, October 15, 1982, defendant (Mr. Cunningham) at meeting with trial judge produced a pre-trial agreement along with judgment of $8,500.00 for Judge Morgan to read and sign.[4] Pre-trial agreement states,[6] "there is a setoff of $8,500.00 on jury's judgment of $17,000.00."

Defendant (Mr. Cunningham) in his answer to complaint[7] filed against him admitted Judge Morgan signed pre-trial agreement and judgment at meeting on October 15, 1982[4] - seven weeks after trial. Judge Morgan in trial testified he knew of and signed pre-trial agreement before trial began.[8]

Judge Morgan also testified in court that it would be adviseable for jury to know about any pre-trial setoff, and also stated he thought it was a legal situation.[9] Judge Morgan also testified, when asked if payments were

(See appendix 4,6,7,4,8 , 9)

due under contract, he stated, "that petitioner had to be held to the contract."[10]

SECOND INSTANCE:

Complaint filed against Mr. Cunningham by petitioner in Moore County Superior Court, September 20, 1983, No. 83CVS583.

THIRD INSTANCE:

October 21, 1983 motion for summary judgment filed by defendant and denied on count one by Judge Coy E. Brewer."[11]

FOURTH INSTANCE:

Due to defendant's (Mr. Cunningham) interference[12] with other attorneys on his own behalf, petitioner was unable to obtain legal assistance from any attorney in the area.

Evidence pertaining to legal assistance obstructions by defendant (See appendix No. 11 & 12)

not allowed in trial by Judge Preston Cornelius.[13]

As attorney for petitioner and after filing second complaint for malpractice against defendant in Moore County Superior Court, Attorney, Marland C. Reid of Fayetteville, N.C. by order of Judge F. Fetzer Mills has himself removed from case without informing his client and without his clients approval or permission.

FIFTH INSTANCE:

January 6, 1986, Superior Court Moore County case goes to trial before Judge Preston Cornelius, without legal assistance, petitioner had to represent self.

Prior to summation Judge Cornelius dismissed case on motion from defendant.

(See appendix No. 13)

SIXTH INSTANCE:

June 26, 1986 petitioner files for appeal in North Carolina Court of Appeals, twentieth district, No.8620SC530. Appeal denied.

SEVENTH INSTANCE:

December 18, 1986, petitioner for review under North Carolina law GA7A31-B2 filed in North Carolina Supreme Court, twentieth district. Appeal denied April 7, 1987, No. 730P86.

REASONS FOR GRANTING THE WRIT

Proof of the defendant's (Mr. Cunningham) negligence in representing his client is a matter of record.[14] He has testified and there is ample evidence that he was negligent in his representation of his client.[15] It is also an established fact the petitioner

(See appendix No. 14, 15)

has been damaged by the defendants' actions. The defendant is also guilty of obstruction of justice.

Judge Melzer A. Morgan testified in court that he knew about and signed[8] the pre-trial setoff prior to trial which he presided over. If this is true he became party to the pre-trial setoff that was not presented in trial.[9] Defendant (Mr. Cunningham) confirms Judge Morgan read and signed pre-trial setoff in the presence of Mr. Cunningham and Mr. Sasse on October 15, 1982, seven (7) weeks after trial was over.[7]

Judge Cornelius as trial judge erred in his granting dismissal when he was aware of two major factors presented in the case before him. One was the pre-trial agreement of an offset that admittedly damaged the petitioner; and

(See appendix No. 8,9,7)

two, was the conflicting prejudicial testimony of Judge Morgan and substantiated as being bias by the evidence as presented by the defendant,[7] (Mr. Cunningham).

In answer to petitioner's appeal in the Court of Appeals the defendant (Mr. Cunnin gham) is guilty of using erroneous referrals of law[17] in trying to substantiate his illegal action of implementing a pre-trial setoff.

In the North Carolina Court of Appeal's answer to the petitioner's appeal of the Superior Court's judgment, they make statements that only can be called erroneous suppositions.[18] Their statement, "the plaintiff avoided $8,500.00 which he would have had to pay IF McCrimmon had not breached the contract."(end quote) This statement

(See appendix No. 7,17, 18)

is reprehensible. It is based solely on an "IF" assumption which has no place or standing in law - especially in a Court of Appeals.

The Court of Appeals also were prejudicial in using irrelevant quotes[18] from "Contracts" by E. Allan Farnsworth. They state, "In measuring damages in a breach of contract case the defendant is entitled to a credit for loss avoided by plaintiff." (End quote) There was no situation or claim for avoided loss in trial, and if there were they should have been claimed prior to and in trial. Evidence has proven the Defendant (Mr. Cunningham) as the attorney for the plaintiff (Mr. Sasse) had already informed the defendant (Mr. McCrimmon, contractor) that no further payments would be made on contract and he was filing ~~for~~ additional damages.

(See appendix No.18)

The Appeal's Court statement,[18] "it was not malpractice for Mr. Cunningham to stipulate to what the law required," (end quote) is another erroneous statement of law. In the Appeals Court s own referral book of law "Contracts" there are a number of explicit rules of law on this subject of contracts which the court overlooked or ignored. One example,[19] Page 643 8.23, (Quote) "Even without the benefit of the rule of UCC2-609, if a party believes that the other party will not perform, he is free to act on that belief. If it turns out that he is right, he is shielded from liability, even if he failed to render a performance of his own that was due at an earlier time." (end quote)

The Supreme Court of North Carolina in their approval of the Appeals Court must stand with the same errors in

(See appendix No. 18, 19)

judgment of the law.

In another attempt to circumvent the code of ethical responsibility, the defendant (Mr. Cunningham) in his appellee's brief to the North Carolina Court of Appeals No. 8620SC530, used a referral of law that also makes him guilty of using irrelevant referrals and usurping their meaning.[20] The defendant stated, "In Durham Lumber Co., Inc., v. Wrenn-Wilson Construction Co. 249N.C. 680, 107 S.E. 2d, 538 (1959) the Supreme Court decided a case which is pertinent to the present appeal." In Durham Lumber Co., the plaintiff contractor sued to recover the unpaid portion of a building contract. The defendant counterclaimed for defects in the building. The court held that if the damage to the building exceeded the unpaid portion of the contract the

(See appendix No.20)

defendant could recover the excess of the damage over the unpaid portion of the contract. In other words, their offset by operation of law." (end quote)

In explaining the hypocrisy in the above statement as related to the case in point need only be done by the obvious fact the plaintiff and defendant are reversed. In example case the defendant as building owner is counterclaiming for excess damage done by contractor (plaintiff). If defendant in above case were to be plaintiff and owner of building and suing for excess damage to his building over unpaid portion of contract then it would indeed be a proper referral and would also confirm petitioner's claim that defendant (Mr. Cunningham was guilty of malpractice in offsetting his client's money by misrepresenting the law.

The defendant also makes another statement of law that is irresponsible.[21] He states, "Mr. Sasse simply does not agree that under the law of North Carolina an owner is obligated to pay the balance of the contract price when the owner sues a contractor for alleged defects." (End Quote) This is a total irrational and negligent statement that cannot be substantiated by any referral of law. It is also and without doubt, used to damage the petitioner.

The Court of Appeals and the Supreme Court also used this immaginative law to base their dismissed judgment[18] of the case presented to them for proper and legal judgment.

Again, in the defendant's (Mr. Cunningham) answer brief[22] submitted by North Carolina Court of Appeals, in reply to claim by petitioner, which was, "Mr. Cunningham stipulated in pretrial

(See appendix No. 21, 18,22)

agreement that petitioner still owed contractor the unpaid balance of $8,500.00." The defendant (Mr. Cunningham) reply to this was, "It is denied that Cunningham stipulated that the plaintiff still owed the unpaid balance of $8,500.00 although it is admitted that Cunningham stipulated that the $8,500.00 balance under the contract would be setoff against any judgment in favor of the plaintiff." The defendant (Mr. Cunningham) is thus admitting and denying responsibility for the same situation.

In the Defendant's (Mr. Cunningham) letter[23] of September 20, 1984 to attorney, Marland C. Reid, he states, "there was nothing improper in stipulating to the $8,500.00 offset", contradicting his admission that he had already informed the contractor no further payments would be made on the contract.
(See appendix No.23)

A plausable reason for the defendant's (Mr. Cunningham) change of legal opinion along with the impropriety of his clients' interests in trial apparently occurred when he found out, and has admitted in court, that one of the sub-contractors who was a co-defendant happened to be a past client of his law firm.[24]

Evidence was presented in trial[25] against defendant (Mr. Cunningham) by the testimony of a knowledgeable member of the bar that once a contract between two parties is broken by one of the parties, and proven in court, under no theory of law could the contractor in this case by entitled to repayment of $8,500.00 under the breached contract.

The defendant (Mr. Cunningham) has testified and stated in his counter-

(See appendix No.24, 25)

claim that he, without informing his client, instituted a $8,500.00 write-off of his client's money in a pre-trial agreement and did not file this action till seven weeks after trial. In doing so the defendant (Mr. Cunningham) in what can only be considered an illegal act, became guilty of professional malpractice and he also breached the code of professional responsibility as stated in Canon 1-3-5-6-7-8 and 9 of the American Bar Association legal code.

The defendant (Mr. Cunningham) is also flagrantly guilty of obstructing justice. In a September 20, 1984 letter to Attorney Marland C. Reid, the defendant (Mr. Cunningham) states,[12] "I have already talked to several other lawyers about Mr. Sasse, but apparently

(see appendix No. 12)

they haven't persuaded him that he received good representation." (end quote)

IN SUMMARY - THE QUESTIONS THIS COURT MUST RESOLVE ARE:

1. Is there any precedent in law where an attorney without client's knowledge or consent in a secret pre-trial agreement between himself and defendants, can setoff a jury's decision on damages his client may receive? (See appendix No 4,6,9.)
2. Is there any precedent in law which allows a court to knowingly withhold information from a jury that has direct bearing on their decision? (See appendix #9.)
3. Is there any precedent in law where the breacher of a contract is entitled to full restitution on a

contract he failed to fulfill or abide by? (See appendix #2,10,18)

4. Is it an acceptable precedent of proper court proceedings for trial judge to reverse stated trial rules to favor a defendant; or for a trial judge to perjure himself in testimony to protect a fellow colleague? (See appendix #7,8,19)

5. Is there any precedent in law that gives an Appeals Court the authority to use hypothetical suppositions as legal precedents?

Example: The Appeals Court based their judgment of rejecting appeal on this statement, "The plaintiff avoided $8,500.00 which he would have to pay "IF" McCrimmon had not breached the contract." Such a statement is obviously prejudicial when the court knew

McCrimmon had indeed breached the contract. .

6. Is there any precedent of law or has the American Bar Association a new code of ethical responsibility that allows attorneys to encompass control on other attorneys as to whom they may or may not engage?
(See appendix #12.)

FINALLY:

Any legal system must have a base of reliability. There would be no legality in a system that promotes or protects discrimination in its dealings with its clients or citizens before it.

I claim an attorney has damaged his client and I also claim I have established enough evidence to substantiate this claim.

I also claim and have offered evidence the court system can and will go to any lengths in protecting a fellow colleague of the court from liabilities for damages. Such action is discrimination by the courts and only the Supreme Court of United States of America can and must decide if it violates the laws of the land; and, of course, the Constitution of the United States which all members of the court system including the Supreme Court of the United States have sworn to protect and uphold.

An irreconcilable conflict now exists between the members of the legal system be they members of the bar or of the courts and the common citizen as presented and referred to in the constitution. As a result an intolerable situation has been created. Accordingly,

a Writ of Certiorari must issue to review and clarify the appropriate standards to be applied in all cases where discrimination by the legal system is asserted in any attempt to justify legal conspiracy.

CONCLUSION

For all the foregoing reasons it is respectfully requested that a Writ of Certiorari issue to review the judgment and opinion of the North Carolina Supreme Court.

Respectfully submitted,

Howard A. Sasse

Howard A. Sasse, pro se

APPENDIX 1

Contract between H. A. Sasse, Owner and McCrimmon Construction Co. dated 14 August 1980, states, "Erection of building, etc. All the above work to be completed in a substantial and workmanlike manner for the sum of $18,500.00."

APPENDIX 2

Mr. Cunningham's letter dated March 12, 1981 addressed to Mr. McCrimmon (contractor) states, "The $8,500.00 balance owing to you on the original contract would be offset against the damages to the building and lost profits for Mr. Sasse. Therefore, no additional payment would be made to you by Mr. Sasse."

APPENDIX 3

Complaint against McCrimmon filed May 15, 1981 by Mr. Cunningham on behalf of petitioner, count one, item 5 states:

"That said job was not completed by the defendant in a substantial and workmanlike manner. That specific defects in the construction of the building include, but not limited to, the following:

1. The building posts are not plumb.
2. Anchor bolt settings were not placed in accordance with the drawings.
3. The side panel laps and roof panel laps are in the opposite manner of what is considered proper and intended.
4. Roof sheets are skewed.
5. Cable bracing has been installed improperly.
6. Three short panels along the eve line of the building nearest the road were incorrectly lapped.
7. Screws were drilled in the roof and stripped.

8. Roof sheets have been damaged by workmen standing on the sheets improperly.

9. Skylights have been installed without lapping and do not follow the configuration of the roof sheets.

10. Roof panels were improperly sealed.

6. That such defective construction constitutes a breach of contract and a violation of express warranties of performance in a substantial and workmanlike manner.

3. Item 7 of above complaint filed May 15, 1981 by Mr. Cunningham as attorney for petitioner, states: "That as aproximate result of the defendant's breach of contract and/or breach of warranty, the Plaintiff, Howard A. Sasse has a building which is not suitable for the purposes for which the Plaintiff purchased the

building, and the Plaintiff is therefore denied the benefit of his contract with the defendant. That the Plaintiff, Howard A. Sasse purchased all materials for said building and he has therefore lost the benefits of the materials which he purchased with his own funds. That the life expectancy of the building has been diminished. That the fair market value of the building has been diminished from what it would have been if the defendant had properly performed its contract. Item 8 of complaint states: "That the Plaintiff Howard A. Sasse has been damaged in the amount of $50,000.00 as a result of the defendant's breach of contract and/or breach of warranty." "Wherefore, the Plaintiff, Howard A. Sasse, prays that he have and recover of the Defendant the sum of $50,000.00 plus the cost of this action to be taxed

against the Defendant, and for such other and further relief as the Court deems just and proper."

APPENDIX 4

JUDGMENT, SUPERIOR COURT, MOORE COUNTY, NORTH CAROLINA, FILE NO 81 CVS322 FILED OCTOBER 15, 1982 SIGNED BY JUDGE MELZER A. MORGAN:

This cause coming on to be heard before the undersigned Judge Presiding at the August 23, 1982 Civil Session of Moore County Superior Court and a jury, and the jury answering the issues submitted as follows:

1. Did McCrimmon Construction Co.,Inc. or one of its subcontractors, breach an express warranty of workmanlike quality to Howard Sasse and Wood Wand Corp. regarding the erection of a metal building? Answer - yes

2. What amount of damages have Howard Sasse and Wood Wand Corp sustained?
Answer - $17,000.00.

And it further appearing to the Court and the Court finding as follows:

Thathe parties, prior to trial, entered into the following stipulations:

1. That there is a balance of $8,500.00 under the contract between the Plaintiff and Defendant which will be set off against any judgment in favor of the Plaintiff.

2. The Third-Party Defendant will indemnify the Defendant from liability on any judgment in favor of the Plaintiff.

3. All issues shall be tried before the jury except the counterclaim for $1,700.00 which shall be removed to Civil District Court for hearing before the judge.

Based upon the foregoing verdict and

stipulations, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff shall have and recover of the Defendant the sum of $8,500.00 plus the cost of this action, including interest at the legal rate.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant shall have and recover of the Third-Party Defendant the sum of $8,500.00 plus the cost of this action, including interest at the legal rate.

This the 15 day of October, 1982."

APPENDIX 5

TRANSCRIPT OF JUDGE'S CHARGE TO THE JURY IN THE GENERAL COURT OF JUSTICE, SUPERIOR COURT DIVISION 81CVS322 DATED AUGUST 23, 1982 LINE 10 thru 14 states:

"The Plaintiff on the one hand

contends that as to issue number two you should answer that second issue in the amount of $23,481.00. The Defendant, Freedom Construction Company, says you should answer this issue in some amount not more than $7,200.00."

APPENDIX 6

ORDER ON FINAL PRE-TRIAL CONFERENCE IN THE GENERAL COURT OF JUSTICE, SUPERIOR COURT DIVISION, FILE NO 81CVS-322 dated AUGUST 24, 1982, SIGNED AND FILED OCTOBER 15, 1982, ITEM 5 STATES:

"In addition to the other stipulations contained herein, the parties stipulate and agree with respect to the following undisputed facts:

1. "There is a balance of $8,500.00 under the contract between Plaintiff and Defendant, which will be set off against any judgment in favor of the Plaintiff."

APPENDIX 7

COMPLAINT FILED BY HOWARD A. SASSE AGAINST BRUCE CUNNINGHAM, THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION DATED SEPTEMBER 20, 1983, SIGNED BY HOWARD SASSE, ITEM 5 STATES:

"That on October 15, 1982, the Defendant did present to the Judge of said trial, the Judgment of the trial for his signing and also the pretrial agreement. Both documents were then approved and order to be filed by the judge.'

DEFENDANT'S, MR. CUNNINGHAN'S ANSWER TO ABOVE COMPLAINT IN THE GENERAL COURT OF JUSTICE, SUPERIOR COURT DIVISION, FILE No. 83CVS583 DATED SEPTEMBER 22, 1983, SECOND DEFENSE - COUNT ONE, ITEM 5 states:

"The allegations contained in paragraph five are admitted."

APPENDIX 8

TRIAL TRANSCRIPT, VOLUME I, IN THE GENERAL OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 84CVS799 AT THE JANUARY 6, 1986 CIVIL SESSION BEFORE THE HONORABLE PRESTON CORNELIUS, JUDGE PRESIDING. PAGE 103, LINE 7 thru 13, TESTIMONY BY JUDGE MORGAN:

"Before I began the jury selection, I had a pre-trial conference with the lawyers. None of the parties were present, only the lawyers. At that time I was presented a pre-trial order. The lawyers signed that at some point in the day and before jury selection began, and then I signed it."

APPENDIX 9

JUDGE MORGAN FURTHER TESTIFIES IN COURT ON PAGE 103, LINE 14 thru 25:

Question: You were aware then that in this pre-trial agreement that this $8,500.00 set off was being made.

Judge Morgan's answer: That is correct. Item Number 5 of the pre-trial order or called order on final pre-trial conference.

Q. In a situation like that, your Honor, would the jury be required to know that there was a pre-trial setoff on their judgment? In other words, they are saying there that any judgment made on my behalf would be set off by $8,500.00 . Is that a normal situation?

A. Your question is, "Would the jury be required to know?"

Q. Yes

A. They would not necessarily have to know. It might be (continued on page 104, line 1 thru 25): adviseable because of a particular trial strategy not to mention that there was a specific amount of money owing. One of the dangers being that the jury might offset that and come up with nothing for the party who's pursuing the

claim. I think that you will remember that as a part of my instructions in the case, I indicated that the jury should not be concerned about any amount unpaid on the contract. One of the reasons that I did that was because in the latter part of the testimony for one of the other parties, not yourself, there was some indication by the subcontractor who put up your building that he hadn't been completely paid. Any my concern was that the jury not speculate about that amount. And that they understand that I would make an adjustment for that and I would make an adjustment for that pursuant to the pre-trial order which had been agreed to b y your lawyer.

Q. Is it normal though for stipulations to be made against a judgment of a jury? In other words, after trial?

A. Setoffs are not uncommon. The idea is to try to distill down to the essence - the controversy and to let the jury focus on that as opposed to giving them the opportunity to become distracted by something else. So, no, it's not unusual.

Q. Is it legal to have a trial and have stipulations where there is claims being made that are not referred to in that trial? In other words, we have here $8,500.00 claim as being made against me, but it's not even mentioned -- only as a fact (continued on page 105, line 1 thru 3) of payments to be made. It's not brought up in the trial. Is that the legal situation?

A. I think it is.

APPENDIX 10

(FURTHER TESTIMONY BY JUDGE MORGAN IN TRIAL TRANSCRIPT, VOLUME I, PAGE 105, LINE 4 thru 9):

Q. There was no claims for payments due me in the trial was there?

A. That was a fact that was not controverted before the trial. So, that was something that the jury needed to deal with. In other words, if you were going to pursue the contract, you had to be held to the contract."

APPENDIX 11

IN MOTION FOR DISMISSAL BY MR. CUNNINGHAM, DISMISSAL DENIED, ORDER SIGNED BY COY E. BREWER, PRESIDING JUDGE IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION, FILE NO 83 CVS583 DATED October 21, 1983, AND STATES IN PART:

"The motion for summary judgment with respect to Count 1 is DENIED."

APPENDIX 12

LETTER WRITTEN BY BRUCE CUNNINGHAM ADDRESSED TO ATTORNEY MARLAND C. REID,

FAYETTEVILLE, NORTH CAROLINA DATED SEPTEMBER 20, 1984, LAST PARAGRAPH, READS,

"Please give me a call if you would like to discuss the case further. I have already talked to several other lawyers about Mr. Sasse, but apparently they haven't persuaded him that he received good representation. Hopefully, you will be able to, and I will be glad to provide you with anything in my file that would help."

APPENDIX 13

TRANSCRIPT OF PRETRIAL CONFERENCE, IN THE GENERAL COURT OF JUSTICE, SUPERIOR COURT DIVISION 84CVS779, BEFORE THE HONORABLE PRESTON CORNELIUS, JUDGE PRESIDING ON JANUARY 6, 1986, PAGE 41, LINES 10 thru 19 STATES:

(Mr. Van Camp, Attorney for Mr. Cunningham): Do I understand, if your

Honor please, and I think I've got the sense of the Court's ruling on this, is that in jury selection or any other statement to the jury, any other matter dealing with attempting to hire other lawyers is not relevant to this lawsuit.

(Mr. Sasse): I object to that.

(Court) Well --

(Mr. Sasse) My whole file is --

(Court) That's not the basis of the lawsuit. The way he conducted that trial --

APPENDIX 14

COMPLAINT OF MALPRACTICE AGAINST MR. CUNNINGHAM FILED BY MARLAND C. REID FOR PLAINTIFF IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO 84CVS779 DATED OCTOBER 23, 1984, PAGE 3, PART IX STATES:

"That notwithstanding the cost to replace the roof and the cost to replace

the walls totaled $23,090.00 or $14,590.00 above the plaintiff's contract price with McCrimmon, nevertheless Cunningham stipulated in the Pretrial Agreement in the Plaintiff's suit against McCrimmon that the plaintiff still owed McCrimmon the unpaid balance of $8,500.00".

APPENDIX 15

ANSWER TO ABOVE COMPLAINT BY JAMES VAN CAMP AS ATTORNEY FOR MR. CUNNINGHAM DATED NOVEMBER 5, 1984, PAGE 2, PARAGRAPH 9, STATES:

"It is denied that Cunningham stipulated that the Plaintiff still owed the unpaid balance of $8,500.00, although it is admitted that Cunningham stipulated that the $8,500.00 balance under the contract would be set off against any judgment in favor of the Plaintiff."

APPENDIX 16

COMPLAINT FILED BY MARLAND C. REID AS ATTORNEY FOR PETITIONER IN MOORE COUNTY, NORTH CAROLINA, SUPERIOR COURT DIVISION FILE NO. 84 CVS779 DATED OCTOBER 23, 1984, PAGE 2 ITEM V STATES:

"That in August, 1980, the plaintiff entered into a contract with McCrimmon Construction Co., Inc. for McCrimmon to erect a metal building on property owned by the plaintiff using metal building parts and supplies furnished by the plaintiff; that in the erection of said building by McCrimmon's subagent, the roof leaked, the columns were out of alignment and the structure was braught with numerous construction defects; the plaintiff demanded that McCrimmon repair or replace the defective construction, but McCrimmon refused to do so unless

the plaintiff agreed to pay for said corrective work in advance; under the plaintiff's contract with McCrimmon, the plaintiff initially paid $10,000.00 and the balance of $8,500.00 was due upon McCrimmon's satisfactory completion of the work; McCrimmon refused to satisfactorily complete the work and the plaintiff sought the services of Cunningham in March, 1981.

PART VI OF SAME COMPLAINT STATES:

"In March, 1981, the plaintiff employed the defendants and they agreed to represent the plaintiff and thereafter Cunningham, an agent of Pollock, Fullenwider undertook to represent the plaintiff concerning all matters in dispute between the plaintiff and McCrimmon."

PART VIII OF SAME COMPLAINT STATES:

"On April 14, 1981, Cunningham wrote

to McCrimmon's attorney advising he had instructed plaintiff to replace the roof and that he was gathering other information on damages; on April 23, 1981, the plaintiff, at Cunningham's directions, obtained a contract price to replace the roof for $10,681.00; on May 15, 1981, Cunningham filed suit on behalf of the plaintiff for $50,000.00 for breach of contract and/or breach of warranty; on October 7, 1981, the plaintiff obtained a proposal to replace the defective walls for $12,409.00".

PART IX OF SAME COMPLAINT STATES:

"That notwithstanding the cost to replace the roof and the cost to replace the walls totaling $23,090.00, or $14,590.00 above the plaintiff's contract price with McCrimmon, nevertheless Cunningham stipulated in the pre-trial agreement in the plaintiff's suit

suit against McCrimmon that the plaintiff still owed McCrimmon the unpaid balance of $8,500.00."

APPENDIX 17

NORTH CAROLINA COURT OF APPEALS, NO 8620SC530, TWENTIETH DISTRICT, MOORE COUNTY NO 84 CVS779 DEFENDANTS-APPELLEES" BRIEF - Part II STATED:

"The trial court did not err in directing a verdict in favor of the Defendant." (exception No 4 P p 18)

"The Plaintiff's argument on this assignment of error is based on a premise that is not supported by the evidence. Mr. Sasse argues that Mr. Cunningham improperly stipulated to an $8,500.00 offset in a pre-trial order."

APPENDIX 18

NORTH CAROLINA COURT OF APPEALS, FILE

NO. 8620SC530 DATED 18, NOVEMBER 1986, MOORE COUNTY NO 84CVS779 STATES IN WHOLE:

Appeal by plaintiff from Cornelius, Judge. Judgment entered 22 January 1986 in Superior Court, Moore County. Head in the Court of Appeals 21 October, 1986. STATES IN WHOLE:

"This is an action for an attorney's malpractice. The plaintiff who is not an attorney represented himself at trial and on the appeal of this case. The plaintiff's evidence showed that in August of 1980 the plaintiff entered into a contract with McCrimmon Construction Company to construct a building on the plaintiff's property for $18,500.00. The plaintiff paid McCrimmon $10,000.00 upon the completion of a portion of the building. The building was erected in a defective manner. When the defects

were not remedied to the satisfaction of the plaintiff he retained the defendant Cunningham who is an attorney to represent him on his claim against McCrimmon,

Bruce Cunningham brought an action for the plaintiff against McCrimmon. In a pre-trial order Bruce Cunningham stipulated that plaintiff had not paid $8,500.00 on his contract with McCrimmon and this amount would be offset against any recovery the plaintiff might have against McCrimmon. This stipulation was made without conferring about it with the plaintiff. The plaintiff procured a verdict of $17,000.00 at the trial, which amount was offset by $8,500.00 in the judgment.

Prior to the trial of this case a pre-trial conference was had. Judge Cornelius

advised the plaintiff at this conference that in order to prove his case he would have to "first of all, you would have to show his advice (fell) below a standard of reasonableness. Second, but for the error, results of the preceding case would have been different, a two point standard." Judge Cornelius also told the plaintiff that Judge Morgan who had presided at the trial in plaintiff's case against McCrimmon "can testify as to what rulings he made. He can't express an opinion on this case is what I am saying. It would be improper for him to express an opinion."

At the trial of his case Judge Morgan was called as a witness by the plaintiff. The plaintiff did not ask Judge Morgan a question as to whether in his opinion Mr. Cunningham exercised the appropriate

degree of skill in representing Mr. Sasse. On Cross-examination Judge Morgan testified that in his opinion Mr. Cunningham did exercise such appropriate degree of skill.

At the end of the plaintiff's evidence the court allowed the defendant's motion to dismiss. The plaintiff appealed.

Howard A. Sasse pro se.

Van Camp, Gill, Bryan, Webb & Thompson, P.A. by James R. Van Camp for defendant appellees.

WEBB, Judge.

The plaintiff's first assignment of error deals with the statement of Judge Cornelius at the pre-trial conference as to the proof required of the plaintiff to make his case. The plaintiff contends that the court erred "by requiring of plaintiff a burden of proof not supported by North Carolina law."

This statement by Judge Cornelius at the pre-trial conference is not subject to an assignment of error. If Judge Cornelius properly ruled at trial on the proof required of plaintiff that is all that was required of plaintiff that was all that was required. We do not mean to imply by this holding that Judge Cornelius made an incorrect statement of the law.

The plaintiff next assigns error to the court's allowing Judge Morgan to express an opinion on cross-examination as to the legal competence of Mr. Cunningham when the witness had not be allowed to express such an opinion on direct examination. The opinion expressed by Judge Morgan was favorable to the defendant. The plaintiff was not prejudiced by not being allowed to offer evidence favorable to the defendant.

In his last assignment of error the plaintiff contends that he proved legal malpractice on Mr. Cunningham's part when the evidence showed Mr. Cunningham's part when the evidence showed Mr. Cunningham stipulated to a reduction in the judgment by $8,500.00 without informing the plaintiff of such a stipulation. In measuring damages in a breach of contract case the defendant is entitled to a credit for loss avoided by the plaintiff. See Contracts, by E. Allan Farnsworth, Little Brown and Co. 12.9, p.848. As applied to the plaintiff's claim against McCrimmon the plaintiff avoided $8,500.00 which he would have to pay if McCrimmon had not breached the contract. This was a set off which the law would have applied. It was not malpractice for Mr. Cunningham to stipulate what the law required. This

assignment of error is overrules. We affirm the judgment of the Superior Court.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

Report as per Rule 30 (e).

APPENDIX 19

SEE "CONTRACT"S BY E. ALLAN FARNSWORTH, LITTLE,BROWN AND COMPANY PAGE 643, 8.23.

APPENDIX 20

IN NORTH CAROLINA COURT OF APPEALS NO. 8620SC530 TWENTIETH DISTRICT MR. CUNNINGHAM DEFENDANTS-APPELLEES' BRIEF DATED JULY 14, 1986, PAGE 3 STATES:

"What Mr. Sasse ignores is that it was an admitted fact in the pleadings of the original case that Sasse had paid to the contractor only $10,000.00 of the $18,500.00 contract price. (See reply Sasse V. McCrimmon). Mr. Sasse admits this fact again in his own

Statement of Facts in his Brief to this Court. In DURHAM LUMBER COMPANY, INC. V. WRENN-WILSON CONSTRUCTION CO., 249 N.C. 680, 107 S.E. 2d, 538 (1959) the Supreme Court decided a case which is pertinent to the present appeal. In DURHAM LUMBER COMPANY, the plaintiff contractor sued to recover the unpaid portion of a building contract. The Defendant counterclaimed for defects in the building. The Court held that if the damage to the building exceeded the unpaod portion of the contract, the Defendant could recover the excess of the damage over the unpaid portion of the contract. In other words, there was an off-set by operation of law. The Court stated:

"In an action to recover the unpaid portion of the contract price, the Defendant, under his denial of

Plaintiff's alleged performance, may show, in diminution of Plaintiff's recovery, the reasonable cost of supplying omissions, if any, and of remedying defects, if any; and, if such costs exceed the unpaid portion of the contract price, the Defendant may, by counterclaim, recover the amount of such excess." HOWIE V. REA, 70 N.C. 559; MOSS V. KNITTING MILLS, 190 N..C. 644, 130 S.E.635; MASON V. ANDREWS, 192 N.C. 135, 133 S.E. 402."

APPENDIX 21

IN THE SAME APPELLEES' BRIEF REFERRED TO ABOVE, MR. CUNNINGHAM STATES:

"The DURHAM LUMBER COMPANY case is similar to Mr. Sasse's claim against McCrimmon Construction Co. Mr. Sasse simply does not agree that under the law of North Carolina an owner is obligated to pay the balance of the contract price when the owner sues

sues a contractor of alleged defects. It is this refusal to agree with the law which now prompts Mr. Sasse to insist that Mr. Cunningham was negligent in stipulating to the $5,500.00 offset (Mr. Cunningham's mistake in amount of offset).

Therefore, it is respectfully submitted that there was an offset by operation of law and, since Mr. Sasse admits the facts necessary to establish the offset, that Mr. Cunningham did nothing improper to entering into the pre-trial stipulation.

IN NO. 8620SC530, TWENTIETH DISTRICT NORTH CAROLINA COURT OF APPEALS FROM MOORE COUNTY NO. 84 CVS779, INDEX-ANSWER, FILED BY MR. CUNNINGHAM November 5, 1984, 12:30 P.M. PAGE 6, PARAGRAPH 9 STATES:

"It is denied that Cunningham

stipulated that the plaintiff still owed the unpaid balance of $8,500.00 although it is admitted that Cunningham stipulated that the $8,500.00 balance under the contract would be set off against any judgment in favor of the plaintiff.

APPENDIX 23

SEPTEMBER 20, 1984 LETTER TO MARLAND C. REID (Attorney for petitioner at that time) FROM BRUCE T. CUNNINGHAM, JR. (Defendant) STATES:

"There was nothing improper in stipulating to the $8,500.00 offset."

APPENDIX 24

IN SUPERIOR COURT MOORE COUNTY, STATE OF NORTH CAROLINA FILE NO 84CVS799 TAKEN FROM TRANSCRIPT OF TRIAL, VOLUME II, JANUARY 6, 1986 BEFORE JUDGE PRESTON CORNELIUS, PAGE 146 LINE 8 thru Page 146, Line 1, MR. CUNNINGHAM IN REPLY TO QUESTIONS ON STAND:

Q. Were we suing Freedom Construction Company?

A. No

Q. I'm sorry, were we suing McCrimmon Construction Company?

A. Yes.

Q. But McCrimmon Construction had a counterclaim put in there that Freedom would be held responsible.

A. That's the third party complaint.

Q. Therefore, Freedom Construction Company then would be paying the $18,000.00 of the payment against McCrimmon.

A. McCrimmon could have passed through the entire $17,000.00, is that what you're asking?

Q. Did you ever do any legal work for Jack Ferroll, President of Freedom Construction?

A. About ten years ago Mr. Van Camp represented Metal Building Systems Incorporated, I believe. At that time I was an associate and I knew who Mr. Ferroll was. I believe he was one of the partners.

APPENDIX 25

IN LETTER FROM ATTORNEY MR. MARLAND C. REID DATED SEPTEMBER 14, 1984 ADDRESSED TO MR. BRUCE CUNNINGHAM STATES IN WHOLE:

"Dear Mr. Cunningham:

I have been retained by Howard A. Sasse to represent him in an action against you and your firm for the recovery of damages sustained when you represented Mr. Sasse against McCrimmon Construction Company, Inc.

My client has provided me with a complete set of pleadings, copies of all correspondence to and from you and the

the other parties involved in the litigation and a copy of all the pleadings in the action he previously brought against you which was voluntarily dismissed on January 8, 1984.

I have copies of the trial transcripts and I have studied those carefully along with the other material Mr. Sasse gave me.

Let me say initially that only after careful study of all the materials did I agree to represent Mr. Sasse. I have a natural reluctance to file suit against another lawyer. However, I sincerely believe you were negligent in the conduct of this case, that Mr. Sasse has been damaged thereby and that justice dictates he be able to employ counsel even if the claim is against a fellow member of the bar.

In a nutshell, I believe your error was in stipulating to the offset of $8,500.00 on any recovery the plaintiff made in the case. Clearly, there was a breach of contract by the defendant. Mr. Sasse had obtained an estimate and paid for the new roof to bring the building into compliance with the contract. He also had obtained an estimate to repair the walls which were defectively constructed. The correspondence from the defendant himself clearly shows and acknowledges a breach of the contract. Under these circumstances, under no theory of law of which I am aware would the defendants be entitled to payment of the balance due under the contract of $8,500.00.

I have very closely evaluated Mr. Sasse's damages using the cost approach

versus the diminuition in value approach. I realize there was a question of fact whether the breach of contract was so material as to defeat the very purposes of a contract which in turn would dictate the proper measure of damages, but under either measurement of damages, there is no way Mr. Sasse could have been made whole with a stipulation to offset the balance due under the contract.

I hope we can settle this case without having to file a Complaint. The Complaint, as you know, must be filed prior to January 8, 1985. I do not know whether you have professional liability insurance and wish to turn this matter over to them or not. I note you defended the action brought by Mr. Sasse yourself. In any event, I need to hear from you or your liability carrier by Friday, September 21, 1984, or I will be compelled to file

the Complaint.

As you know, Mr. Sasse paid $23,774.00 for the materials he furnished to McCrimmon Construction Company in addition to the $10,000.00 he paid McCrimmon, Thereafter, he paid $11,581.00 to remedy the defective roof and had an estimate of $12,409.00 to remedy the defective walls. By the time his jury verdict was offset by $8,500.00 he was left woefully short of what he should have recovered, plus he is still left with a defective building. I hope we can discuss and compromise the full measure of damages Mr. Sasse has sustained. If we cannot, my responsibility dictates that I sue for and seek recovery of consequential and incidental damages in addition to the damages caused directly by the breach of warranty.

I will be happy to discuss this with you or a member of your firm or counsel for your insurance carrier. I would appreciate hearing from you."

signed, Marland C. Reid.

++

No. 730P86 TWENTIETH DISTRICT

SUPREME COURT OF NORTH CAROLINA

++++++++++

HOWARD A. SASSE)

V.)

BRUCE T. CUNNINGHAM, JR) FROM MOORE

and POLLOCK, FULLENWIDER,) (8620SC530)

CUNNINGHAM & PATTERSON,)

PA.)

++++++++++

ORDER

Upon consideration of the petition filed by Plaintiff in this matter for discretionary review of the decision

of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 7th day of April, 1987.

s/ Whichard, Jr.

For the Court"

Witness my hand and the seal of the Supreme Court of North Carolina , this the 8th day of April 1987

J. GREGORY WALLACE

CLERK OF THE SUPREME COURT

s/ Peggy N. Byrd
ASSISTANT CLERK